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No. 87-1723

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

C. M. ENGLISH,

Petitioner

vs.

PABST BREWING COMPANY and
PMP FERMENTATION PRODUCTS, INC.
a wholly owned subsidiary of
PABST BREWING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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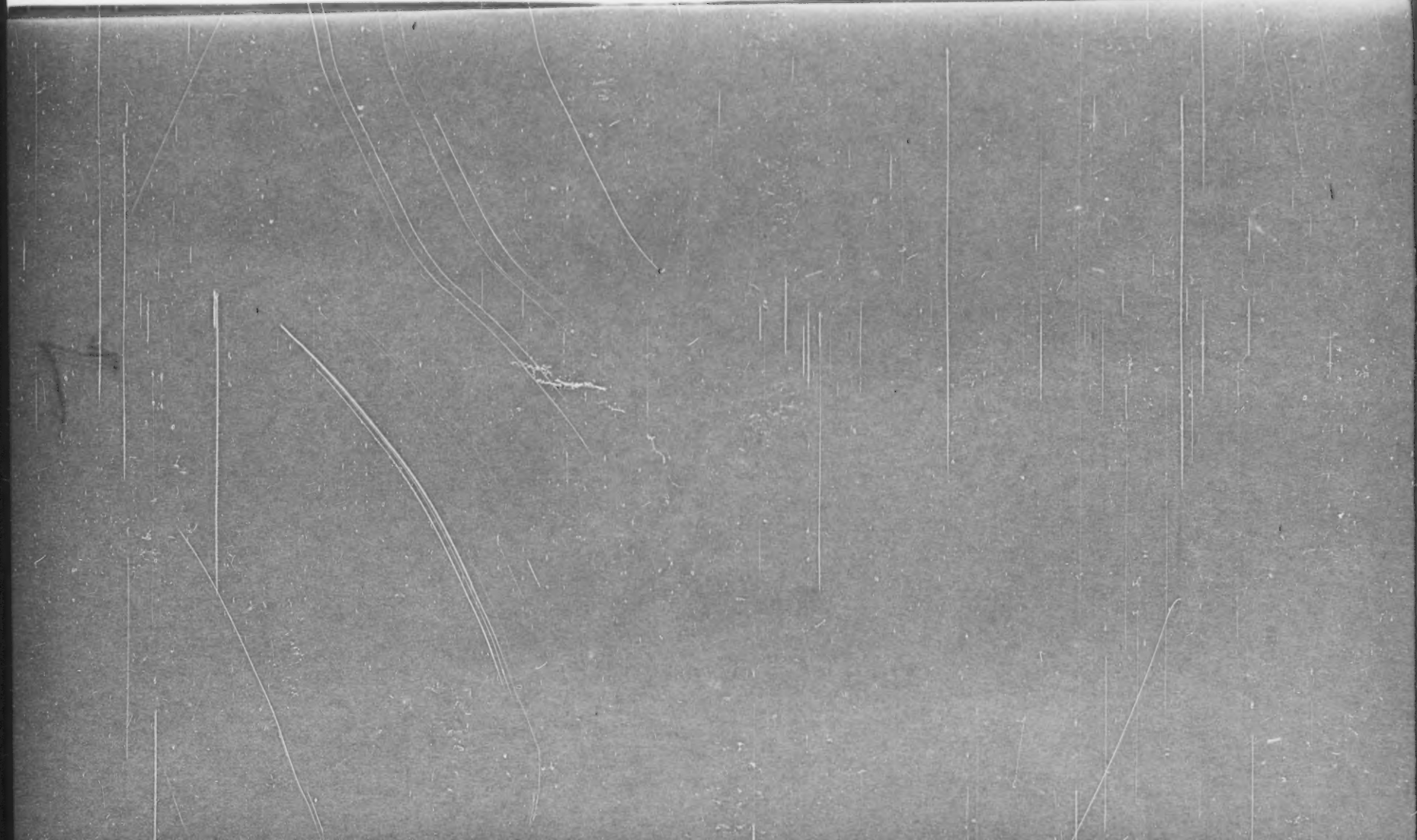

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly upheld the granting of summary judgment where Petitioner failed to meet his burden to establish a *prima facie* case of age discrimination.
2. Whether Petitioner's argument that the Statute of Limitations should be tolled is moot because the lower court properly upheld the granting of summary judgment on the merits of the age discrimination claim.
3. Whether the lower court properly refused to toll the Statute of Limitations because required

information on the Age Discrimination in Employment Act was properly posted at Respondents' premises in accordance with 29 U.S.C. §627 and 29 C.F.R. §1627.10, and Respondents did not conceal or misrepresent anything which would justify Petitioner's belated charge which was 179 days late.

STATEMENT OF THE CASE

Petitioner, Charles M. English, was employed by Respondent, Premier Malt Products, Inc. (herein "PMP"), as a field sales representative on or about August 4, 1958. PMP was a subsidiary of Respondent, Pabst Brewing Co. (herein "Pabst").[1] PMP initially produced and sold primarily malt products and later began producing and selling textile enzymes, as well as other industrial chemicals in an effort to maintain sales. The Petitioner was hired as a field salesman for the sale of malt products in the southeastern United States and later took responsibility for the sale of industrial chemicals.

Petitioner was terminated in a reduction in force after PMP had suffered from falling sales in spite of having added industrial chemicals to its product line. Thereafter Pabst decided to cease producing malt products entirely. On April 15, 1982, Pabst sold the PMP malt product line to a Michigan concern. As a result of the closure of the malt product portion of the PMP line, a complete restructuring of its sales activities was undertaken. Sales through field offices

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[1] Since May 1985, Pabst has been a subsidiary of S & P Co.

were eliminated and all sales activities were more closely coordinated with the Milwaukee office. Customers were serviced by telephone to reduce the number of direct sales calls and only industrial chemicals were sold. As a result of this contemplated restructuring, and between February and April 1982 *the entire field sales staff was eliminated.* Petitioner was informed of his termination on February 9, 1982, effective February 15, 1982, and two other field sales representatives, Gerald Hovley and Donald Clark, and the Sales Manager, Paul Brandli, were terminated effective April 30, 1982. In addition, PMP accepted the resignation of Richard Knors, the remaining field representative.

In the course of implementing its new sales structure following the sale of its malt products line, PMP identified the need for one additional marketing position in Milwaukee. This position was for a Chemical Sales Manager who would act as assistant to Irvin Troy, Sales Manager of PMP. Troy had generally discussed this opening with Hovley and Knors, as they were his two best salesmen. In Knors' most recent evaluation, he rated the best of the four field sales representatives and had received consistently high evaluations from his employer during his tenure. Hovley was rated the second best field sales representative in the most recent evaluation prior to his termination and, like Knors, had consistently received above average ratings by PMP. Further, both Knors and Hovley had strong backgrounds in chemistry, one of the major qualifications for the new sales position. Knors had received a degree in food science from Rutgers University and Hovley had a chemistry degree from UCLA.

Petitioner had also been evaluated by PMP during his tenure. His 1981 evaluation showed he was rated an "average" employee and ranked third out of four sales representatives. His earlier evaluations also resulted in an "average" rating and included comments such as "limited ability to achieve new business, but with much prodding will pursue." Further, Petitioner's knowledge in the chemical sales area was limited as he had no formal training in chemistry. His strongest suit was rapport with customers in the Southwest, a strength which had little significance in the new scheme since all national customers were to be serviced out of the Milwaukee office, with infrequent stops on an individual customer basis.

Based on the relevant qualifications of their former field representatives, PMP did not even discuss this new position with Petitioner, let alone offer it to him.

Instead, it hired Donald Lex on July 19, 1982. Lex had graduated *cum laude* with a degree in chemistry and had previously worked as a successful chemical sales representative. Upon his hire by PMP, Lex worked out of the Milwaukee office with responsibility for sales and service throughout the nation but concentrated in the area east of the Mississippi. Much of his time was spent working out of the Milwaukee office, and he made only three or four trips a year to the Southeast section of the United States for actual sales calls.

After the Petitioner's termination, PMP did not replace his field sales position in the Southeast region of the United States, nor were any field positions created. Instead, upon completion of its restructuring

and by June, 1982, all sales functions were carried out in the central Milwaukee office by a reduced staff.

Though Petitioner was informed of his termination on February 9, 1982, he did not file his claim of discrimination with the EEOC until February 3, 1983, some 359 days after his notification of termination. His claim was filed almost six months after a chance meeting in South Carolina with PMP Sales Manager, Troy and Donald Lex at one of PMP's customer locations. Troy was informed by the customer that Petitioner was also present making a business call and Troy took the initiative to greet Mr. English and introduce him to Mr. Lex.

At all relevant times, PMP properly posted notices required under ADEA, 29 U.S.C. §627, in conspicuous places both in its production facilities and at its Milwaukee headquarters. Petitioner visited the Milwaukee plant at least once or twice a year and therefore had regular access to the ADEA postings. Also, Petitioner admits that immediately after he was informed of his termination, he visited the Pabst personnel offices in Milwaukee, where ADEA notices were posted. Petitioner further concedes that he was generally aware of the laws prohibiting discrimination based on age prior to his termination.

On November 21, 1985, Petitioner filed an action in the United States District Court for the Western District of North Carolina alleging age discrimination. After filing their answer and undertaking discovery, Respondents moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The District Court granted Respondents' motion for summary judgment by order entered October 8, 1986.

The District Court held that the action was time-barred because the charge of discrimination had not been filed within 180 days after the alleged discriminatory termination. The District Court rejected Petitioner's equitable tolling arguments, holding that the facts were undisputed: (1) that Respondents had not concealed or mislead Petitioner; (2) that Respondents had posted ADEA notices; and (3) that Petitioner was generally aware of his right to be free of age discrimination and possessed such knowledge well before his termination.

The District Court went on to decide the substantive merits of the case, holding that Petitioner had failed to establish a *prima facie* case of age discrimination, because he could not establish the fourth element of the test — that he had been replaced by someone of comparable qualifications outside the protected class. The District Court found that all the evidence indicated that Donald Lex was hired for a substantially different position in national chemical sales, and that Petitioner had no background or education comparable to Lex's *cum laude* degree in chemistry and three years of chemical sales experience.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision on September 15, 1987. On the substantive issue, the Court of Appeals agreed with the District Court that Petitioner had failed to submit evidence showing the fourth element of the *prima facie* case. The Court of Appeals also affirmed the District Court's ruling that the claim was time barred and that no facts warranting tolling of the filing period were presented. Regarding the posting requirement, the

Court of Appeals noted that the affidavits of two former employees demonstrated that the ADEA notices had been properly posted at the Employer's premises at all relevant times in accordance with the statute, 29 U.S.C. §627, and implementing regulations, 29 C.F.R. §1627.10. The Appeals Court further noted that Petitioner had actually been present at the facility where the notices were posted at the time of his termination. Finally, the Court of Appeals agreed with the District Court that there were no facts showing concealment or deception by Respondents, and therefore the Appeals Court found equitable tolling to be inapplicable.

ARGUMENT

1. THE COURT OF APPEALS APPLIED ESTABLISHED LAW AND PROPERLY UPHELD THE GRANT OF SUMMARY JUDGMENT BECAUSE PETITIONER FAILED TO PRESENT A GENUINE FACTUAL ISSUE ON THE NECESSARY FOURTH ELEMENT OF A PRIMA FACIE CASE.

The decision below upholding summary judgment on the substantive age discrimination issue is eminently correct. It does not conflict with any decision of this Court or of any court of appeals. Accordingly, review by this Court is unwarranted.

As Petitioner notes (Pet. 20), it is well established that in the absence of direct evidence of age discrimination, the order of proof recognized by this Court in *McDonnell-Douglas Corporation v. Green*, 411

U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is applicable to the issue of whether Petitioner established a prima facie case of age discrimination.

This Court has emphasized recently that summary judgment is a proper vehicle for the early resolution of unmeritorious lawsuits. First, this Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to that element, then summary judgment is appropriate. *Celotex v. Cattret*, ___ U.S. ___ , 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___ , 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a geniune issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 528 (1986).

In cases arising under the ADEA, the federal courts have not hesitated to uphold the grant of summary judgment where, as here, an age discrimination plaintiff has failed to present a genuine factual issue as to one of the essential *McDonnell-Douglas* elements of

the *prima facie* case. *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980), *cert. denied*, 464 U.S. 1018 (1981); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1390 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 462 (5th Cir. 1982); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir. 1986); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1425 (7th Cir. 1986).

Applying these established principles, the District Court and Court of Appeals found summary judgment appropriate because English could not establish the fourth element of the *prima facie* case, to wit, that he had been replaced by someone of comparable qualifications outside the protected class. No genuine factual dispute existed on this issue in that Lex, with a *cum laude* degree in chemistry and three years experience in chemical sales, was demonstrably better qualified for the position than English, who had no comparable education or experience. Further, the job itself had been restructured so markedly as to constitute a different position than that which Petitioner had formerly held.

The decisions of the lower courts were in complete accord with well-established principles regarding both the grant of summary judgment and the elements of a *prima facie* case of age discrimination. This Court has in recent years clarified the law regarding the standards for summary judgment and the elements of a *prima facie* case of employment discrimination, hence no further clarification of the law in these areas is

necessary. Moreover, this case turns on its own particular facts and affects only the parties hereto. Thus, there exists no reason for a grant of certiorari in this case.

Contrary to Petitioner's assertions (Pet. 20-23) there is no factual dispute on the bona fides of the corporate restructuring of PMP, and Petitioner has presented no evidence disputing the fact that the Employer underwent a "rather complete metamorphosis" in selling its malt line, concentrating on chemical sales, eliminating the entire field sales staff and servicing its national customers mainly by telephone from Milwaukee. A grant of certiorari to review these undisputed facts would be clearly inappropriate.

2. BECAUSE THE COURTS BELOW PROPERLY DECIDED THE CASE ON ITS MERITS, THE ISSUES REGARDING EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS ARE MOOT, AND ANY PURPORTED ERROR WOULD CONSTITUTE HARMLESS ERROR.

As set forth above, the Court of Appeals properly upheld the grant of summary judgment on the merits of the age discrimination claim. For this reason, any purported error of the courts below regarding the equitable tolling of the Statute of Limitations would be moot and would constitute harmless error.

On the hearing of a writ of certiorari, the Court should not disturb the judgment of the lower courts where there is harmless error which does not affect the substantial rights of the parties. 28 U.S.C. §2111; *See*

Rule 61 Federal Rules of Civil Procedure. *United States v. Lane*, 474 U.S. 438, 445, 106 S.Ct. 725, 88 L.Ed.2d 814, 823 (1986); *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 553-554, 104 S.Ct., 78 L.Ed.2d 663 (1984).

In the instant case, the Court of Appeals properly decided the substantive age discrimination issue and therefore any purported error regarding tolling of the Statute of Limitations was harmless, as it did not affect the outcome of the case nor Petitioner's rights.

Because the lower courts properly decided the merits of the case, the equitable tolling issue is moot, as it will not affect the outcome of this case. This Court and all "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." *Defunis v. Odegaard*, 414 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), *quoting*, *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). For this additional reason, the petition for certiorari should be denied.

3. THE LOWER COURTS PROPERLY REFUSED TO TOLL THE STATUTE OF-LIMITATIONS.

The decision below was also correct in upholding the grant of summary judgment for the additional reason that the claim was time barred and no tolling of the Statute of Limitations was appropriate. Contrary to Petitioner's assertions, the decision in this regard turns on its own particular facts, and is not in conflict with

Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977), which is factually distinguishable.

In the instant case, it was undisputed that properly posted ADEA notices were present both at PMP's production facilities and at the headquarters of Pabst, its parent corporation, in Milwaukee. Affidavits by Pabst employees Gary Lewitzke and Al Crusoe were submitted in support of the summary judgment motion which stated that the information under 29 U.S.C. §627 was posted in a conspicuous place upon the premises of both the parent and the subsidiary. This is all that is required by the ADEA, 29 U.S.C. §627, and its implementing regulations. 29 C.F.R. §1627.10. Petitioner regularly visited the PMP plant once or twice a year during his tenure, and in fact, was present at both the PMP plant and the Pabst personnel offices, where ADEA notices were conspicuously posted, immediately subsequent to his termination. Petitioner also admitted that he was generally aware of the laws proscribing age discrimination even before he was terminated.

Based on these facts, the lower courts properly found equitable tolling to be inappropriate. The District Court found *Charlier* to be factually distinguishable because here ADEA postings were conspicuously posted in the very factility where Petitioner was informed of his termination, and Petitioner was generally aware of his right not to be discriminated against because of age even prior to that time.

By way of contrast, in *Charlier*, one of the plaintiffs contended he had visited the employer's regional office only three times in nineteen years and that he could not therefore have been aware of his ADEA rights on

account of such a posting. The plaintiff there further contended that the first time he became aware of any state or federal laws that proscribed age discrimination was a number of months *after* his discharge. These facts clearly distinguish *Charlier* and demonstrate that there is no actual conflict in the circuits on this issue.

Similarly, the lower courts in this case properly concluded that no equitable tolling was warranted, because there was no factual showing that PMP had concealed facts from or deceived Petitioner. Petitioner asserted that the fact that he had been replaced by Lex was concealed from him. The lower courts found that (1) PMP introduced Lex to Petitioner and hence was not concealing anything; (2) the restructured position was so markedly different that Lex was *not* Petitioner's replacement; and (3) Petitioner waited nearly six months after meeting Lex to file his ADEA charge. Based on these undisputed facts, the lower courts properly found no basis for equitable tolling of the Statute of Limitations. This result is correct, and review of this fact specific determination is unwarranted.

CONCLUSION

Based on the foregoing, the writ of certiorari should be denied.

DATED: May 13, 1988

Respectfully submitted,
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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on May 13, 1988, I served the within *Brief for Respondents in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 13, 1988, at Los Angeles, California.

Claude A. Lagardère
(Original signed)